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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al.,
Respondents.

WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

REPLY OF RESPONDENTS TO PETITIONERS' PETITION FOR REHEARING.

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From a reading of the petition for rehearing, one would conclude that this Court had ignored the record, had not read the briefs and had not heard the oral argument. With two exceptions, hereafter referred to, petitioners' reasons for rehearing are nothing but repetitions of the argument made by them in their briefs and oral argument, in many instances predicated upon inaccurate statements of the facts similar to those previously made by them.

Petitioners' first reason for rehearing (one of the aforesaid two exceptions) is that:

"This court based its entire opinion upon the as-

> sumption Harris and Odell were agents of the bankrupt."

Petitioners' statement is incorrect. This Court's opinion shows it did not "assume" that petitioners were the agents of the bankrupt. Relying upon the record and the findings of the District Court and the Circuit Court of Appeals, this Court found that petitioners were such agents. That petitioners were in fact the agents of the bankrupts has been previously shown by respondents (respondents' brief, pp. 30-32, 43-43; respondents' reply brief, pp. 1-3). Petitioners further say that this Court was in error in stating that the courts below found that petitioners were agents of the bankrupt. This Court's statement was correct. As we pointed out (respondents' brief, pp. 31-32; respondents' reply brief, pp. 2-3) the District Court, in making the findings and orders it did, necessarily considered the facts alleged in respondents' petition of May 24th to be true, and the facts alleged in that petition conclusively showed that Odell and Harris were the agents of the bankrupt, and said petition specifically so alleged. (R. 28.) The Court of Appeals specifically found that Odell and Harris were the agents of the bankrupt. That Court said (R. 132):

> "The essential question presented by the appeal is whether the court had jurisdiction to disburse the controverted fund. It is the contention of appellants that neither they nor appellees were parties to the bankruptcy proceeding and that the controversy, therefore, is one between two third parties having no connection with the alleged bankrupt or its affairs. It is claimed they were in custody and control of the escrow fund as the agents of appellees, while appellees contend they were acting on behalf of the alleged bankrupt. While it may be said the record does not expressly so show, yet the circumstances are such that the latter contention must be accepted. The escrow provision was a part of the agreement between appellees and the alleged bankrupt. The bankrupt, under the agreement, was to employ Odell to conduct the litigation regarding the validity of the tax. For that purpose, under the agreement, he

plainly was the agent of the bankrupt. Harris was Vice President of the bankrupt and the money in question was collected by it and deposited in an account which was opened under their direction. It seems to us, even though it has been finally determined the bankrupt had no interest in the escrow fund, that the same was so closely connected with its affairs in that it was controlled and in the custody of its officers and agents, that the court properly acquired jurisdiction of the fund."

While petitioners admit that this Court will not review questions of fact settled by the Circuit Court of Appeals, they assert that "the fact of agency has not been settled in the court below." As petitioners' claim is directly contrary to the record, nothing further need be said concerning this alleged ground for rehearing asserted by petitioners.

Petitioners' claim that this Court misconstrued the agreed order and overlooked entirely its nature and how it was procured is merely a repetition of what has been thoroughly covered by the briefs and oral argument. (Petitioners' brief, pp. 34-40; petitioners' reply brief, p 15; respondents' brief, pp. 48-56; respondents' reply brief, pp. 10-12.) This Court's statement in its opinion that:

"Furthermore, petitioners consented and agreed in open court and respondents assented to the court's disposition of the Fund in a summary proceeding."

is strictly in accord with the record facts.

Petitioners claim that this Court ignored entirely the fundamental issue of jurisdiction presented. The fact is just to the contrary. This Court's opinion commences as follows:

"Did the bankruptcy court in this involuntary proceeding have jurisdiction to order the disposition of property in the possession of persons found by the court to be holding as agents of the alleged bankrupt?"

Petitioners claim that this Court declined even to com-

ment upon their contention that they were deprived o property without any opportunity to be heard. This claim is merely an unjustified criticism of this Court, in line with petitioners' consistent policy of attacking the District Court, the Court of Appeals and counsel for respondents, regardless of the facts. Petitioners ignore entirely the statement made by this Court, based upon the record, that:

> "In response to the court's request to answer, petitioners alleged that the court had no jurisdiction to determine rights relating to the Fund. • • • The following day the court ordered that petitioners' pleadings which challenged its jurisdiction over the $20,000 balance in the Fund be struck, and that petitioners answer within twenty days to the merits on respondents' claim to this balance.
>
> "Petitioners did not answer, but appealed from both orders."

The Court of Appeals also expressly found that petitioners were not deprived of any opportunity to be heard, but that they consistently declined to assert any interest or show any right in the Escrow Fund. (R. 133.)

Petitioners claim that they should not be charged personally with interest. Their claim is based upon (1) their assertion that the order ordering them to turn over the money to respondents is void for want of jurisdiction despite the fact that the District Court, the Circuit Court of Appeals and this Court have all determined and decreed that the District Court had jurisdiction and that the order was valid; and (2) their assertion that they were trustees and not agents of the bankrupt, despite the fact that all of said courts have found to the contrary. But there are additional reasons why their claim should not be considered.

They have no legal right to ask this Court to modify the order of the Court of Appeals concerning interest

entered April 11, 1938. (R. 197.) Their petition for a writ of certiorari did not ask for a review by this Court of said order of the Court of Appeals. In said petition petitioners specifically prayed this Court to review *only* the judgment of the Circuit Court of Appeals entered March 9, 1938, affirming the District Court orders of July 12, and July 13, 1937. (Petition for certiorari, pp. 1-2.) Their specifications of errors (brief for petitioners, pp. 8-9) did not include any specification of error regarding the order of the Court of Appeals for the payment of interest; and in none of their briefs filed in this Court did petitioners mention the point. We assume, without further discussion, that this Court will not consider a request by petitioners that this Court modify or reverse an order of the Circuit Court of Appeals, made by petitioners for the first time in their petition for rehearing.

If petitioners' claims that they were trustees of the Escrow Fund, not agents of the bankrupt, that they were acting throughout these proceedings not for their own benefit but to protect the beneficiaries of the Fund, and that they have a substantial interest in the Fund were sound, then the Circuit Court of Appeals would not have ordered petitioners to pay interest from the date petitioners were ordered to turn over the money until they turn it over. But the record in this case not only refutes petitioners' claims, but proves the contrary. The record proves, as respondents have previously pointed out in their briefs (respondents' brief, pp. 17, 63; respondents' reply brief, pp. 5, 10-11) that this litigation was instituted by these respondents because petitioners, agents of the bankrupt and, as such agents, custodians of the Escrow Fund, refused to perform their simple duty to the owners of the Fund of distributing it to said owners. The record proves that petitioners have violated their

duty to these respondents and have carried on this lit gation not for the purpose of protecting any ben ficiaries—(the beneficiaries of the Fund whom the pet tioners claim they were protecting were these respon ents, who were asking that they be not "protected" b petitioners but that the money be turned over to them), but in the expectation that by making it expensive an difficult for respondents to obtain their money, petitioner would compel respondents to pay them something to whic they were not entitled. Since the order of July 12, 193 was entered by the District Court, the appeals which hav been prosecuted by the petitioners have been for the pur pose of delay and annoyance only. Therefore, it is re spectfully submitted by respondents that the order of the Court of Appeals that petitioners personally pay interes on the part of the Fund they were ordered to turn over for the period of the pendency of the appeals, was correct just and proper.

With their customary disregard of the record facts, peti tioners, in discussing this question of interest, refer to the Special Committee as the "so-called Special Committee." Upon the allegations of respondents' sworn petitions (R 31, 72) not denied in any respect, the District Court spe cifically found in its order of July 12, 1937, that

> "George V. Dahl, Henry P. Reger and Louis Naro wetz, Sr., Special Committee on Illinois Retailers' Oc cupation Tax, are authorized to receive, on behalf o the petitioners, the moneys belonging to petitioners i said Sales Tax Escrow Fund in the National Builders Bank of Chicago." (R. 98.)

And petitioners' supersedeas bond, signed by them, pro vides:

> "Payment to Obligees of any payments due t Obligees under this bond shall be made by making pay ment to George V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Special Committee on Illinois Retailers Occupation Tax." (R. 127.)

It is further respectfully submitted by respondents that this Court has the right to, and should, enter an order here, as heretofore requested (respondents' brief, p. 70; respondents' reply brief, p. 12), assessing against petitioners damages in the sum of 10% of $48,580.40, in accordance with Rule 30 of this Court. As is apparent from the record, petitioners had no interest in the $48,580.40 they were ordered to turn over to respondents, and there was no reason for their refusing to comply with the order of July 12, 1937, and prosecuting the appeals to the Circuit Court of Appeals and to this Court, except to harrass respondents and to prevent them from getting the money which belonged to them so that respondents would be inclined to pay something to petitioners to which petitioners were not entitled. This is, it is submitted, a clear case of trivial appeals prosecuted only for the purpose of delay and to harrass opposing litigants. It is, therefore, submitted that paragraph 2 of Rule 30 of this Court should be applied, and that the mandate of this Court, in addition to affirming the decree of the Circuit Court of Appeals, should provide that petitioners pay to respondents, out of petitioners' own money, damages in an amount equal to 10% of $48,580.40. This relief has been granted by this Court in similar cases. See

Wagner Electric Manufacturing Co. v. *Lyndon*, 262 U. S. 226; 67 L. Ed. 961.

Deming v. *Carlisle Packing Co.*, 226 U. S. 102.

For analogous cases, see

Chicago Bonding & Surety Co. v. *United States, for use of Frank Adams Electric Co., et al.*, 261 F. 266, 269.

Robertson v. *Wilkinson*, 10 F. (2d) 311, 312.

By reason of petitioners' appeal to the Circuit Court

of Appeals and to this Court, which were essentially f
olous and prosecuted solely for the purposes of delay
annoyance, respondents have been compelled to have t
attorneys perform extensive services. If this Court
ders petitioners to pay respondents damages of 10%
said $48,580.40, the amount so received by respond
will be merely partial compensation to respondents
the damages they have suffered by reason of said appe

It is, therefore, respectfully submitted that petition
petition for rehearing should be denied; and that
Court should enter an order providing for payment
respondents by petitioners of damages of 10% of $
580.40, and that said payment shall be made to Geo
V. Dahl, Henry P. Reger and Louis Narowetz, Sr., Spe
Committee on Illinois Retailers' Occupation Tax, as is
method of payment specifically provided in the su
sedeas bond filed in this Court. (R. 126.)

Respectfully submitted,

SIGMUND W. DAVID,
Attorney for Dahl-Stedman
et al., Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1938.

In the Matter of Tax Service Association of Illinois, Alleged Bankrupt.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
Roy G. Harris and Benjamin F. J. Odell, Petitioners, *vs.* Avery Brundage Company, et al., and Dahl-Stedman Co., et al., Respondents.	

[November 21, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Did the bankruptcy court in this involuntary proceeding have jurisdiction to order the disposition of property in the possession of persons found by the court to be holding as agents of the alleged bankrupt?

Respondents engaged the Tax Association of Illinois to seek exemption for respondents from an Illinois tax. The contract entitled the Association to $1,500 cash, and an additional $20,000 should the Supreme Court of Illinois find respondents exempt. The contract authorized the Association to retain petitioner Odell as attorney to prosecute the claimed exemption without cost to respondents for his services. Odell endorsed the contract between respondents and the Association with the statement: "I hereby consent to retention under the terms of this agreement." Under the contract respondents made payments—corresponding to their possible tax liabilities—into an Escrow Fund. Petitioners Odell and Harris, employed by the Association, and one Craig, deposited these payments pursuant to a letter[1] to the Bank which declared

[1] "National Builders Bank of Chicago.

"Gentlemen:

"There has been opened with you a certain account entitled Sales Tax Escrow Fund. There will be delivered to you from time to time hereafter for deposit to the credit of said account certain checks for various amounts issued by sundry contractors.

"You are hereby instructed that *the funds from time to time on deposit in said account are not the funds of the undersigned, but are under the custody*

that the funds deposited were not the property of either Odell, Harris or Craig, but were in their custody.

The Supreme Court of Illinois decided respondents were liable for the tax,[2] and thereafter an involuntary petition in bankruptcy was filed against the Association. Craig was willing but Odell and Harris refused to comply with respondents' request for the return of the payments they had made into the Fund, and respondents filed a petition for their recovery in the bankruptcy court. Petitioners consented and agreed in open court to an order of the bankruptcy court which required them to pay seventy-five per cent of the Fund ($242,000) to the State of Illinois in discharge of respondents' tax liability, and which also provided that "the balance in said . . . Fund . . . shall remain and be held . . . subject to the further order" of the bankruptcy court. It recited that petitioners "agreed that [the bankruptcy court] had jurisdiction to enter this order."

Respondents then filed a second petition to recover an additional $48,580.40 from the Fund, with $20,000 to remain "subject to the further order of" the court. In answer to respondents' claim, the Bank and Craig disclaimed any interest in the Fund. The sole claim adverse to respondents was asserted by the receiver of the Association, for $20,000. Neither Odell nor Harris claimed any interest in the Fund. In response to the court's requests to answer, petitioners alleged that the court had no jurisdiction to determine rights relating to the Fund. After a hearing, the court found that it had jurisdiction and ordered petitioners to pay $48,580.40 from the Fund to respondents, the balance to remain "subject to the further order of [the] . . . Court . . . ." The following day the court ordered that petitioners' pleadings which challenged its jurisdiction over the $20,000 balance in the Fund be struck, and that petitioners answer within twenty days to the merits on respondents' claim to this balance.

and control of the undersigned pending the outcome of proposed negotiations with the Department of Finance of the State of Illinois. Withdrawals from the account are to be made only on written order of the undersigned, three of whom must act together as indicated. Each check must bear the signature of either: Benjamin F. J. Odell or Ruth V. Willner; and R. G. Harris or P. N. Weaver, together with E. M. Craig or R. D. Steel." (Italics supplied.)

[2] Brome Co. v. Ames, 365 Ill. 456.

Petitioners did not answer, but appealed from both orders. The Circuit Court of Appeals affirmed.[3]

A court of bankruptcy has jurisdiction to "bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; [and to] cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto," with exceptions not here material.[4] This jurisdiction of the bankruptcy court extends to the determination of controversies relating to all property in the debtor's physical possession *or* in the hands of the debtor's agent at the time of the filing of a petition in bankruptcy.[5] In every case the bankruptcy court has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed.[6]

Here, both courts below found that Harris and Odell were agents of the debtor (the Association) and had custody of the Escrow Fund as such agents at the time the petition in bankruptcy was filed and thereafter. We accept this finding,[7] and proceed to a consideration of the jurisdictional question.[8]

Petitioners controlled and had custody of this Fund as agents of the Association and did not assert any adverse interest in themselves. In the absence of a substantial adverse claim, the bankruptcy court acquired jurisdiction—when the petition in bankruptcy was filed—to determine controversies relating to the Fund,[9] and had power by summary proceedings to compel its surrender.[10] Furthermore, petitioners consented and agreed in open court and respondents assented to the court's disposition of the Fund in a

[3] 95 F. (2d) 373.

[4] Bankruptcy Act, c. 2, 11 U. S. C., Sec. 11 (6, 7). As to exceptions, see Bryan v. Bernheimer, 181 U. S. 188, 194.

[5] Mueller v. Nugent, 184 U. S. 1; see Whitney v. Wenman, 198 U. S. 539, 552; Taubel, Etc., Co. v. Fox, 264 U. S. 426, 432, 433 and notes; May v. Henderson, 268 U. S. 111, 115.

[6] Taubel, Etc., Co. v. Fox, *supra*, 433; May v. Henderson, *supra*, 116. See, Harrison v. Chamberlain, 271 U. S. 191, 194.

[7] "In this case, however, respondent [petitioners] asserted no right or title to the property before the referee, and the circumstances under which he [they] held must be accepted as found by the referee and the District Court." Mueller v. Nugent, *supra*, 15.

[8] Cf. Page v. Arkansas Gas Corp., 286 U. S. 269, 271.

[9] Taubel, Etc., Co. v. Fox, *supra*, 433; see Note 5, *supra*.

[10] Cf. Mueller v. Nugent, *supra*, 14.

summary proceeding. Jurisdiction to try the issues was vested in the District Court sitting as a court of bankruptcy. Since the parties had only a procedural right to have these issues tried in a plenary suit, they were at liberty to waive this right.[11] Petitioners approved the first order which disposed of part of the Fund, and specifically provided that the balance remain "subject to the further orders of" the District Court.

All persons who created or had any possible interest in that portion of the Fund ordered distributed were parties and present in the bankruptcy court. No one of them—including petitioners—asserted or in any way indicated to the bankruptcy court that there could be any interest in the money distributed adverse to respondents. The sole claim adverse to respondents was that of the receiver of the Association, for $20,000. This amount was not distributed and the court retained jurisdiction to determine controversies relating to it.

Petitioners having consented that the Fund be subject to the orders of the bankruptcy court, and that court having determined that petitioners held the Fund as agents of the Association, there was jurisdiction to enter the orders in question.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[11] MacDonald v. Plymouth Trust Co., 286 U. S. 263; Bryan v. Bernheimer, *supra*, 197; see Taubel, Etc., Co. v. Fox, *supra*, 437; Page v. Arkansas Gas Corp., *supra*, 271; cf. Schumacher v. Beeler, 293 U. S. 367, 369.